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JAMES R. BROWNING, Clerk

(547)

Supreme Court of the United States

No. 4—October Term, 1959

JOHN BURCH McMORRAN, Superintendent of Public Works of the State of New York,

Appellant,

v.

TUSCARORA NATION OF INDIANS, also known as TUSCARORA INDIAN NATION,

Appellee.

MEMORANDUM

April 25, 1960.

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BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

IN THE

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TUSCARORA NATION OF INDIANS, also known as TUSCARORA INDIAN NATION,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

This memorandum is filed in response to the direction of the Court, as set forth in the letter of its Clerk dated April 18, 1960.

I.

As to the question of mo[illegible]ness.

The decision and the opinion in *Federal Power Commission, et al.* v. *Tuscarora Indian Nation,* Nos. 63 and 66, October Term, 1959, neither add to nor detract from the situation respecting the question of mootness. They merely restore the factual situation which existed at the time the appellee made its suggestion of mootness.

That situation was that the Power Authority had abandoned its proceedings under the State's power of eminent domain and had elected to acquire the property by proceedings in the Federal District Court under Federal Power Act § 21. There is nothing which we desire to add to that which has already been stated on the question of mootness in our brief in opposition to appellee's suggestion of mootness other than to observe that if the Court of Appeals for the Second Circuit was wrong in holding that the Indian Intercourse Act was applicable to the State of New York, then the State of New York has become the owner in fee, by virtue of the instant appropriation, of the lands which are the subject of the condemnation proceeding in the Federal District Court. Under these circumstances, the State of New York, and not the Tuscarora Nation of Indians, will be entitled to payment of the compensation which will be awarded by the District Court, but the State will be subject to liability for the value of the land, in favor of the Tuscarora Nation—the value to be determined either by voluntary agreement or by award of the New York State Court of Claims.

In the event that the decision of the United States Court of Appeals, Second Circuit, brought here by the instant appeal, is held by this Court to have been erroneous, the condemnation proceeding in the United States District Court for the Western District Court, begun when the decision of the United States Court of Appeals, Second Circuit, was handed down, constitutes a completely futile and superfluous gesture.

II.

A word as to the merits.

In our jurisdictional statement (page 8) reference was made to *St. Regis Tribe of Mohawk Indians* v. *State of New York,* 5 N. Y. 2d 24 (1958), in support of the proposition that the provisions of the Indian Intercourse Act do not apply to the State of New York. This position is, of course, diametrically opposed to that of the United States Court of Appeals, Second Circuit, in the instant case, thus emphasizing the unabated importance of our appeal from that decision.

The *St. Regis* case involved the *purchase,* in 1796, of Indian land by the State. The instant appeal involves the acquisition of title to Indian land by the State through appropriation proceedings. The St. Regis Tribe in applying for certiorari rested their case on this conflict between the State and the federal courts. Our answering brief stressed the want of a grievance in the St. Regis Tribe, since they had been twice paid for what the State acquired from them; but it is true that the New York Court of Appeals did hold the Indian Intercourse Act inapplicable to the State. By denying the petition for certiorari (*St. Regis Tribe of Mohawk Indians* v. *New York,* 359 U. S. 910, No. 613 [1959]) and subsequently denying the petitioner's motion for leave to file a petition for re-hearing (*St. Regis Tribe of Mohawk Indians* v. *New York,* 359 U. S. 1015, No. 613 [1959]), this Court seems to have aligned itself with the New York Court of Appeals on this question.

To leave undetermined which Court—the New York Court of Appeals or the United States Court of Appeals,

Second Circuit—has correctly interpreted the powers of the State of New York, under circumstances and conditions which may readily recur, would be an unfortunate prolongation of dubiety in a field (title to land) where certainty should prevail.

CONCLUSION

Probable jurisdiction should be noted.

April 25, 1960.

Respectfully submitted,

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